87-190

No.

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRANK MARTIN. . . . . PETITIONER

versus

ST. JOE CONTAINER COMPANY . . . . . RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

May the federal courts ignore a reasonable interpretation of the evidence in an employment discrimination case that precludes summary judgment, grant summary judgment, and justify their action upon the authority of McDonnell-Douglass v. Green, 422 U.S. 792 (1973), Anderson v. Liberty Lobby, Inc., ___U.S.___, 106 S.Ct. 2505 (1986), and Celotex Corp. v. Catrett, ___U.S. ___, 106 S.Ct. 2598 (1986)?

II

May the federal courts grant summary judgment in an employment discrimination case before the plaintiff has had an opportunity to complete discovery, the results of which could possibly have precluded summary judgment?

III

May the federal courts grant a motion for summary judgment in a case that involves multiple claims while completely ignoring all but one of the claims?

PARTIES TO THIS PROCEEDING

The Petitioner is Frank Martin.

The Respondent is St. Joe Container Company.

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REPORTS OF OPINIONS BELOW

So far as the Petitioner knows, none of the opinions of the Courts below have been officially or unofficially reported. They are appended hereto beginning at page 44.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the order sought to be reviewed is May 5, 1987 (This Brief, P. 55). It does not show a different date of entry.

No petition for rehearing was filed with respect to the Order sought to be reviewed.

Petitioner believes that this Court has jurisdiction to review the Order in question by writ of certiorari under and by virtue of 28 United States Code section 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE *

Kentucky Revised Statutes 344.020(1)(a)

Kentucky Revised Statutes 344.040(1)

Kentucky Revised Statutes 344.280(1)

Kentucky Revised Statutes 344.450

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* Full citations are in the appendix beginning at Page 63.

STATEMENT OF THE CASE

This is a case in which the Petitioner, Plaintiff below, Frank Martin, alleges that his former employer, St. Joe Container Co., discriminated against him in the terms, conditions, and privileges of his employment and finally discharged him from his job, all because of his race (Black) and/or in retaliation for his having filed two complaints of discrimination against St. Joe with the Equal Employment Opportunities Commision of the United States. Martin's lawsuit was filed pursuant to the Kentucky Civil Rights Act, Kentucky Revised Statutes (KRS) chapter 344.

Substantive Facts

St. Joe Container Company hired Frank Martin during August, 1972, as a utility laborer. The company discharged Martin from his employment on November 22, 1982. Prior to his discharge Martin was working as a machine operator and was primarily responsible for what was called a "hot melt" machine into which folded boxes were fed so that glue could be applied to the proper areas on the boxes. Martin was a member while employed

at St. Joe of the United Paperworker's International Union, Local Number 1048.

The general atmosphere at St. Joe while Martin worked there was permeated with racial hostility toward Blacks, as the following evidence of record in this case shows beyond any doubt.

In 1973, when Martin was chief union steward, he complained about the fact that the names of black production workers at St. Joe had stars beside them on the company's employee roster. Ed Cermak, the company's Production Manager and the person with the power to hire, fire, and discipline production employees throughout the tenure of Martin's employment at the company, freely admitted to Martin that the only purpose of the stars was to designate that the individuals with stars beside their names were Black. As a result of Martin's complaint about this practice, the stars were removed from St. Joe's employee rosters. However, Cermak tagged Martin as a "militant" because of his complaint and began, as we shall see in more detail later, an hateful campaign of harassment and retaliation designed to

get Martin fired from his job or to force him to quit his job (Joint Appendix for the Court of Appeals, hereinafter JA, Pp. 197-198, #7).

At some time during 1977, Larry Barker, a white St. Joe employee, called Martin a "black nigger" upon three separate occassions. Martin complained to Cermak, who told Martin to ignore Barker and took no action against Barker (JA, P. 193, #2-d).

At some time during 1981 or 1982, Emmitt Mikesell, a white St. Joe employee, called Lonnie Richardson, a Black foreman, "nigger." Mikesell "apologized" on the spot, excusing himself by saying that the words had "slipped out." No disciplinary action was taken against him as a result of this incident (JA, Pp. 192-193, #2-C).

In addition to being subjected to invidious identification by St. Joe management and racial disparagement by St. Joe employees that management obviously at least condoned, Blacks at St. Joe were subjected to other only slightly less subtle forms of discrimination while Martin worked there.

This type of discrimination took several forms.

One was that Blacks were much more harshly treated than whites, as the following examples will illustrate.

St. Joe fired Martin for the last time for allegedly pushing a load of boxes on to a conveyor against his supervisor's orders and for allegedly calling the supervisor, Lonnie Richardson, a "nigger." While Martin has always emphatically denied these charges, he has also pointed to numerous incidents in which whites behaved as he was alleged to have behaved upon this occassion without being disciplined in the least.

Martin testified that he frequently heard white employees Louise Perkins, Joyce Patten, and Carol Miller curse supervisor Lonnie Richardson without any discipline ever being administered against them (JA, P. 192, #2-A). On one occasion Martin heard a white employee tell her supervisor and Ed Cermak that she was going to disobey the supervisor's order by pushing her entire, ". . . god damn load" of boxes on to the conveyor belt of her machine. This employee was not disciplined (JA, P. 192, #2-B).

During early April, 1982, Martin's supervisor, Lonnie Richardson, gave Martin a written reprimand for leaving a band saw running at a low speed while he went to the bathroom. A few days later a white employee left his band saw on full blast while he went to the bathroom. According to Martin, Richardson witnessed this incident but took no disciplinary action whatsoever against the white band saw operator (JA, P. 193, #2-D).

As we have seen, upon numerous occassions white St. Joe employees used crude racial epithets in addressing Martin and other Black workers at the company without being disciplined for such behavior. Not only was Frank Martin fired for such alleged behavior, but so was another Black, Dwayne Savage, a black man who was fired in 1977 for allegedly calling his supervisor, Noel Newman, a nigger (JA, P. 193, #1-H).

In addition to harsher discipline than whites, Black production employees at St. Joe were subjected to less favorable on-the-job treatment than whites in other significant respects.

According to Martin, the white machine operators and helpers with whom he worked, Joyce Patten, Johce Rose, and Louise Perkins, routinely got their machines repaired in minutes when necessary, or at the very least received a polite explanation of why repairs would be delayed (JA,, P. 194, #3-A). Martin, on the other hand, could not get quick repairs for his machine from management or even an explanation of when repairs would be made. He was also often told to fix his machine himself and reprimanded because his machine was broken down. On one particular day during October, 1983, Martin's machine had been "down" for two hours when a repairman responded within ten minutes to a problem reported by one of the white machine operators with whom Martin worked (Id.).

St. Joe management also refused to give Martin the assistance of other employees who happened to be free to help on even important orders, while his white co-workers would almost always receive help when they requested it immediately and as a matter of course. Martin testified to one parti-

cularly egregious incident of this type of treatment that took place during March, 1982, as well as that Beverly Osborne, another Black St. Joe employee, experienced similar problems before the company fired her (JA, Pp. 194-195, #3-B).

During September, 1982, Martin cut himself on the job upon two occasions. Both times Martin's supervisor refused even to give him a band aid. On the other hand, this supervisor immediately attended to white employees with injuries similar to Martin's upon two other occasions during this same month (JA, Pp. 194-195, #3-E).

Martin also testified that management made it very difficult for him to see a union steward while he worked at St. Joe, while his white co-workers were always allowed to see a steward immediately. In addition, according to Martin, when he had to visit a doctor he was always required to return to work with a doctor's statement, while his white co-workers faced no such requirement (JA, P. 196, #3-H).

Finally, when Martin was Chief Union Steward from 1973 until 1977, he was never allowed to att-

end a third step greivance meeting duirng working hours while the whites who had preceeded him in this position, Mike Martinez and Mike Graf, were always allowed to do so (JA, P. 197, #6).

There can be no doubt that St. Joe management was aware of the discriminatory treatment that Blacks routinely faced at the company. In addition to Martin's complaints directly to Cermak as outlined earlier in this Brief, Martin and some of his Black co-workers complained to Lonnie Richardson upon several occassions that he was discriminating against them because of their race. Richardson's response was that, ". . . as long as I'm doing what Ed Cermak wants me to do, I'm alright," (JA, P. 196, #4).

It is reasonable to infer not only that Cermak was behind the blatant discrimination that Richardson dished out to his Black subordinates but also that he was behind the disparate racial treatment that Martin received in discipline from St. Joe, as a brief description of the facts of the relationship of Martin and Cermak will show.

After Martin complained about Cermak's iden-

tification of Blacks on the company's employee roster by race, Cermak told Martin that he (Cermak), ". . . felt like that I was being more like a militant and that I was a bad influence out there [in the plant] for the black people," (JA, P. 36). Cermak made a similar complaint about Martin to a female Black employee of St. Joe's upon another occasion (JA, P. 162, #2-H).

According to Martin, this incident marked the beginning of a campaign of hateful harassment against him by Cermak.

Cermak once told Beverly Osborne that Martin was an "ass," (JA, Pp. 37-38) and he once told Martin himself that:

> . . . he was going to see me out of the plant. . . he can't understand why the company keeps bringing me back to work [after Martin's disciplinary discharges]. . . he knew how to save St. Joe Paper Company some money, that was to retire Frank Martin (JA, P. 39).

Martin testified that Cermak instructed most of Martin's direct supervisors over the years to keep a special watch on Martin. Martin could name four of these supervisors who had specifically

told him that Cermak was, ". . . on your case for some odd reason," (JA, P. 40). Cermak could not even allow a positive remark about Martin to go unrebutted (JA, P. 40) and he was so anxious to "get" Martin that he may even have instructed Martin's supervisors to tamper with the company time-clocks so that it would appear that Martin stayed too long in the restroom! (JA, P. 42).

Not surprisingly, considering the attitude of Ed Cermak toward Martin, Martin was the target of frequent and extreme disciplinary measures while employed at St. Joe.

St. Joe first discharged Martin in September, 1980 (JA, Pp. 7-8). The company alleged that Martin had failed to follow his supervisor's instructions. Martin filed a greivance, at the hearing of which, according to Martin, ". . . there was no support for [the charge of] insubordination (JA, P. 11). The company refused to withdraw the termination despite its lack of evidence to support the charges against Martin. However, it did offer to reinstate Martin with no backpay, no contest to his receipt of unemployment benefits,

and a promise to, ". . . pull my record [of termination from my personnel file]," (JA, P. 11). Martin accepted the company's offer even though he denied that the company had any legitimate reason to discipline him because the union told him that arbitration would take a year and, "I was up against the wall," (JA, P. 11). Martin was allowed to return to work pursuant to this agreement on October 21, 1980, his suspension having formally begun on September 11, 1980 (JA, P. 12).

Martin had been back on the job for only a few days when the company suspended him. Once again, Martin denied any misconduct (JA, Pp. 13-14). He testified that he had a unit of boxes on a conveyor that was about to topple over, because of which he feared attempting to push the boxes into the appropriate machine. Martin then requested that his supervisor look at the stack of boxes before Martin attempted to push it into his machine. The supervisor refused to do as requested and told Martin, "Don't worry about it, go ahead and push it." According to Martin:

> I pushed it and it fell over. Now there's been quite a few white employees who took units and pushed them over and they fell over, and they have not gotten suspended, terminated, or any type of disciplinary action taken against them, and there have also been quite a few white employees who have walked up to a supervisor and told him about the problems that they had, and he would come and check it out for them. Here in my case, it wasn't like that, in fact, most of the blacks that's out there if they have a problem, they can't get it taken care of (JA, P. 13).

As we have seen, Martin testified to the identity of three white individuals who have pushed stacks of boxes that fell over under conditions similar to those that brought about his suspension, behavior that resulted in no disciplinary action being taken against the whites (JA, P. 17).

At his greivance hearing of this suspension, according to Martin, even his supervisor corroborated his version of events (JA, P. 18). Once again, however, Martin agreed to return to work without back pay, "Because I had no other choice," from a practical financial standpoint (JA, P. 18).

On June 3, 1981, St. Joe discharged Martin again. Perhaps unhappy with the company's previous failures to get rid of Martin, Cermak played

an active role in this disciplinary effort.

Martin testified that the day before this particular discharge:

> I was pushing them [stacks of boxes] all day long and stuff, and I had injured my shoulder, you know, and I told my supervisor about it, and he made some kind of smart aleck remark as he'd usually do. . . and he stuck my shoulder or whatever, so I told him I wanted to go see a doctor and have him check it out. . . So he told me ok. . . to go in and see Ed Cermak (JA, P. 17).

Cermak told Martin:

> Well, what we're going to do, Frank, is we're going to put you on sick leave and we're going to see what your doctor has to say (JA, P. 24)

Martin went to a doctor and got a statement from that doctor that same day, June 3, 1981. Martin then returned to work and gave the statement to Cermak. Then, according to Martin:

> . . . as I was giving him my statement he was giving me a termination letter; I asked him then, you know, "I thought you put me on sick leave, and you said you were going to see what my doctor have to say,". . . and he took my letter-the statement that I had from the doctor and just glanced at it and said, "That's not good enough,". . . so I left and went back and got another statement and I brought it back, but see it didn't make any difference if I had

> a hundred statements because he had already terminated me (JA, P. 24)

The company's alleged reason for firing Martin upon this occasion, which Martin testified was a complete and utter fabrication, was that Martin had not run his machine after being ordered to do so by his supervisor (JA, Pp. 23-25, 26, 31).

Once again, Martin got his job back through the union greivance procedure, although he again had to forfeit his claim for back pay as part of the settlement agreement. Martin went back to work on June 3, 1981. The company had also agreed to "pull my record" relating to the incident, according to Martin (JA, Pp. 21-22).

According to Martin, ". . . whites have been hurt [on the job] and not terminated for it, or have not been put on sick leave and then come back, given a statement and been fired," (JA, P. 32).

Martin's next bout with the company took place during February, 1982. On February 1, 1982, Martin attempted to return to work after a sick leave by presenting a doctor's statement that he was physically able to do so. According to Martin, the company's reaction was, "Hey! This statement

ain't no good. We want to see all your [medical] files," (JA, P. 6). Martin discussed the company's demand with a union steward, who advised him to release to the company only those records that related to his latest illness or injury. After a week of manuevering, the company allowed Martin to return to work on February 9, 1982, upon its receipt of the medical records relating to his most recent illness only (JA, Pp. 4-5).

According to Martin:

> There's been other white employees who have been out for sick leave or leave of absence or whatever. . . and not once has the company asked to see their whole complete medical file (JA, P. 3).

The facts surrounding Martin's final discharge by St. Joe Container Company are not substantially different from those surrounding the company's other attempts to deprive him of his job except for the clarity of the proof that Ed Cermak was behind the discharge.

Martin testified that a week or two before he was fired in November, 1982, his immediate suervisor at the time, Lonnie Richardson, told Martin that he (Richardson) had talked to Ed Cermak

about giving Martin some sort of discipline. Richardson refused to tell Martin any of the details of the planned action against Martin, only stating that, ". . . you'll find out," what it was. A few days later Richardson told Martin, "I've got something for you," but again refused to be more specific, stating only, "Don't worry about it, you'll find out soon enough,"(JA, P. 45).

During the morning of November 22, 1982, Martin was taking boxes off of a stack that was too high to feed into a glueing machine when Richardson told him, "That's enough." Martin took this to mean that Richardson considered the stack low enough to feed into the machine. Martin then took another handful of boxes off of the top of the stack, not for the purpose of shortening the stack, but for the purpose of flipping the boxes over so that they could be fed into the machine (they were upside down as originally stacked and could not be fed into the glueing machine until they were turned over). Martin explained what he was doing to Richardson and told him to, "Stay off my case." The two then exchanged some words and Martin told

Richardson that he did not want to argue but that he would go see Ed Cermak instead so that he could get permission to see a union steward. Richardson told Martin to do so. Cermak instructed Martin to return to Richardson. On his way to find Richardson, Martin overheard Richardson telling a union representative, "I want him [Martin] to leave. I can't use him no more." Later in a greivance meeting, Richardson stated that Cermak had told him to suspend Martin. From these facts Martin inferred that Richardson and Cermak had conferred before Richardson made the remark that Martin had overheard him making to the union representative (JA, Pp. 43-48, 50).

Officially, the company originally merely suspended Martin because of this incident. However, by letter dated November 29, 1982, Cermak converted the suspension into a discharge (JA, P. 103). The company's stated reason for its action was that Martin had, ". . . refused to comply with the instructions of his supervisor on four separate occasions," (JA, P. 101). Martin denied that Richardson had given him any instruc-

tions as to how to run his machine on that occasion or that he had refused to follow any instructions that Richardson had given him (JA, Pp. 52-53). Martin also denied Richardson's accusation that he (Martin) had called Richardson a "nigger," although he testified that whites frequently did use that term in referring to Richardson (Id.), as we have seen.

Naturally, Martin filed a greivance over this last in a series of racially motivated and unjust dismissals. This time no compromise was reached and the case proceeded to arbitration. Upon the basis of Martin's disciplinary record with St. Joe, none of which had been "pulled" as the company had led Martin to believe it would be after each of his disciplinary incidents, and of the arbitrator's misunderstanding of the testimony before him,[1] the arbitrator found that the company's discharge of Martin had been for a "just cause" within the meaning of the terms of the company's contract with Martin's union.

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[1]The arbitrator stated that Martin testified that he and Richardson argued over the height of the stack of boxes on November 22, 1982, while in fact Martin's testimony before the arbitrator was that he had no quarrel with Richardson over the height of the stack of boxes (JA, P. 166).

After Martin was fired, the company did not "replace" him on the glueing machine that had been his primary responsibility. Instead it required one black "operator" and two black "helpers" to run Martin's former machine as the need arose (JA, P. 198, #8). Martin contended that the job was undesirable and whites refused to attempt to do it, resulting in its becoming a "Black man's job," (Id.). The company, of course, placed a different gloss upon these facts, asserting that, "Plaintiff was never replaced with a white employee," on the hot melt machine, thereby failing to make out a McDonnell-Douglass prima facie case of racial discrimination in his discharge from employment (JA, P. 210).

Procedural Facts

This lawsuit was originally filed in the Jefferson Circuit Court of the Commonwealth of Kentukcy on October 18, 1983. It alleged illegal racial discrimination and/or retaliation as outlined at the beginning of this petition and was instituted pursuant to the "private suit" provisions of the Kentucky Civil Rights Act, KRS 344.450 (JA, Pp. 55-57), See also KRS 344.040(1).

Martin had originally filed a complaint with the EEOC concerning his discharge, which was effective on November 22, 1982, as we have seen. On June 30, 1983, the EEOC issued to Martin his "Right to Sue" letter, and reported that it had, "No reasonable cause. . . to believe that the allegations made in your charge are true," (JA, P. 110).

On November 7, 1983, St. Joe removed Martin's lawsuit against it to the United States District Court for Western Kentucky at Louisville upon the basis of diversity of citizenship of the parties; St. Joe being a Florida corporation and Martin a resident of Kentucky (District Court Record, Petition for Removal). St. Joe also filed its answer to Martin's complaint that day. It denied liability to Martin and asserted various defenses to his claims (JA, Pp. 58-60).

On December 6, 1983, Martin moved pursuant to KRS 344.450 and FRCP 65(a)(2) for an early trial date or a temporary injunction restoring him to his former position of employment at St. Joe pending a final determination upon the merits of his lawsuit (District Court Record, Plaintiff's Application for

a TRO or an early trial date). In support of his motion Frank Martin filed his affidavit, in which he testified to having been placed in desperate financial straits because of his discharge by St. Joe (JA, Pp. 61-64).

On January 4, 1984, the District Court denied Martin's motion but did set the case down for a pre-trial conference on February 2, 1984 (JA, P. 65).

At the pre-tiral conference, held on February 2, 1984, the Defendant indicated that it intended to file a motion for summary judgment. The District Court therefore ordered, ". . . that this case be passed pending the filing of the motion for summary judgment. In the event the Court denies the motion, the case will be set for trial in the order," (JA, P. 66).

On April 20, 1984, no motion for summary judgment having been filed, the Plaintiff again moved for a trial date, pointing out his abject poverty and the fact that he was about to have his home foreclosed upon (JA, Pp. 68-70).

The District Court never ruled on this motion.

On June 5, 1984, the Defendant filed its mo-

tion for summary judgment (JA, Pp. 71-99; with attachments, Pp. 71-143). On June 25, 1984, having secured an extension of time, the Plaintiff responded to the motion (JA, Pp. 145-160; with attachments, Pp. 145-177). The Defendant filed its Reply Brief on July 6, 1984 (JA, Pp. 178-186).

The Defendant's motion contained two arguments. The first was that the Plaintiff's claims were barred by a Kentucky statute of limitation (JA, Pp. 78-88). The second was that it was impossible as a matter of law for the Plaintiff to show "pretext" in the face of the Defendant's articulated legitimate reason for firing the Plaintiff under the formula set out in the case of McDonnell-Douglass Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 667 (1973) [JA, Pp. 78-96).

Time passed.

On January 17, 1986, over 19 months after the Defendant's motion for summary judgment had been submitted to the District Court for its decision, the new presiding judge, Hon. Boyce Martin of the United States Court of Appeals for

the Sixth Circuit, set the case down for a status hearing (JA, Pp. 187, 188).

This hearing was held on January 30, 1986.

As a result of this hearing and Judge Martin's review of the record of this case, the District Court entered an Order denying the Defendant's motion for summary judgment upon the statute of limitations issue (JA, P. 189). However, Judge Martin expressly retained all other issues, ". . . subject to reconsideration based on direct evidence of employment discrimination to be submitted by the parties," on or before March 1, 1986 (Id.).

On February 28, 1986, the Plaintiff filed his status report and affidavit, in which he attempted to provide all of the "direct evidence of employment discrimination" of which he was aware (JA, Pp. 190-198), and indicated that he had served upon the Defendant some Interrogatories designed to determine if the statistics relating to the Defendant's employment practices would tend to support a "pattern or practice" theory of racial discrimination in the Defendant's

discharge of the Plaintiff (JA, P. 190). The Defendant responded to these Interrogatories with a motion to suspend discovery (JA, P. 206), and the argument that the District Court ought to go ahead and rule on Defendant's long-pending motion for summary judgment without further briefing or discovery (JA, Pp. 199-205).

Plaintiff responded to this suggestion by pointing out to the Court that his Interrogatories were part of his effort to provide the evidence of discrimination that the Court had requested and by strenuously objecting to the possibility that the Court would rule upon the motion for summary judgment without his having an opportunity to file written arguments in light of the Court's having injected the issue of "replacement" into the proceedings at the pre-trial conference on January 30, 1986 (JA, P. 208).

On April 23, 1986, the Plaintiff moved that his case be set down for a date certain for trial (JA, Pp. 211-212). On April 28, 1986, without having ruled on the Defendant's motion to suspend discovery and before the Defendant had responded

to the Plaintiff's Interrogatories, Judge Martin entered summary judgment for the Defendant (JA, Pp. 213-220).[1] The Plaintiff, Frank Martin, then appealed to the United States Court of Appeals for the Sixth Circuit.

***** *****

The District Court concluded as a matter of law that, ". . . the plaintiff's employment history establishes his lack of qualifications for the position of hot melt operator," (JA, Pp. 218-219) so that he could not prevail under any circumstances with his lawsuit because of his having failed to establish one of the four elements of a "prima facie" case under McDonnell-Douglass, supra. Naturally, the Court was relying upon Martin's poor disciplinary record, all of which boiled down to numerous alleged incidents of insubordination (JA, Pp. 218-219) and the fact that Martin could not deny the existence of this record on its face (Id.).

Despite its opinion that Martin's "lack of qualification" settled the matter, the District

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[1]This opinion, of course, is included in the Appendix to this Petition.

Court also concluded that it was impossible for Martin to show that the company's articulated reason for firing him was a "pretext" for illegal discrimination because Martin had been able to prove merely that, ". . . some white employees may have committed some of the same infractions," for which he was disciplined throughout the years, but that none of these incidents were probative of racial discrimination against Martin since, ". . . most of them occurred many years ago and he does not allege that the other employees had any prior disciplinary history," (JA, Pp. 219-220).

In his Brief for the United States Court of Appeals for the Sixth Circuit, of course, Martin pointed out that he disputed the alleged justification for every disciplinary action to which he had been subjected by St. Joe over the years. He also argued that it was outrageous to conclude as a matter of law that a completely unjustified record of disciplinary action could serve to defeat a claim of racial discrimination in employment (Plaintiff's Brief for the Sixth Circuit, P.

16). Martin emphasized that he had testified that the company had promised to "pull" his record of discipline in order to resolve the greivances that Martin filed upon most of the occasions when the company disciplined him and that it had not fulfilled this promise; instead using his record to persuade the Arbitrator to uphold his dismissal for "cause" under the contract between Martin's union and the Defendant (Id., Pp. 16-17).

As to the District Court's conclusion that Martin could not prove pretext, Martin argued to the Sixth Circuit that he had shown subjective racial animus upon the part of the man who fired him, Ed Cermak, and overt discrimination against Blacks upon the part of his immediate supervisor, Lonnie Richardson, who obviously practiced this discrimination despite his Black race because he wanted to please Cermak (Id., Pp. 18-19). Martin, of course, argued that such evidence was more than sufficient to show that the company's stated reason for firing him was but a pretext for unlawful discrimination (Id., Pp. 18-21), as

was the lack of a factual basis for almost all of the discipline that the company had administered to Martin over the years that it employed him (Id.).

At the oral argument of this case, Martin's attorney pointed out to the appeals court that Martin had won several contested hearings relating to unemployment insurance and the Defendant's discharges of him.

Apparently for purposes of argument, the Sixth Circuit agreed with Martin's position that the company had not proven as a matter of law that Martin was unqualified to operate the "hot melt" machine to which he was assigned and that figured in his discharge. However, it accepted the District Court's conclusion, ". . . that Martin failed to adduce 'other evidence' from which an in inference of racial motivation for his discharge could be drawn." (Opinion of the Court of Appeals, Pp. 4-5),[1] even though it saw fit to juggle around the District Court's conclusion as to where this failure of proof should be located in the McDonnell-Douglass catechism (Id.).

The appellate court ignored Martin's proof of racial bias upon the part of Cermak and discriminatory behavior upon the part of Richardson

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[1]This opinion, of course, is included in the Appendix to this Brief.

and opined that:

> At best, he showed only a few isolated and unrelated instances of racial tension occuring in the workplace during his ten years of employment at St. Joe. Such evidence is insufficient to establish that St. Joe had engaged in a long-standing pattern or practice of racial discrimination (Id., P. 5).

Neither the District Court nor the Court of Appeals made any mention whatsoever of Martin's retaliation claim in their respective opinions.

It should be noted that the parties and the Courts below sought to apply the federal case law of employment discrimination, as developed in response to Title VII, 42 United States Code 2000-e, et. seq., even though this case was brought under the Kentucky Civil Rights Act, KRS chapter 344. The authority for this approach, with which the Petitioner obviously has no quarrel, is that it is the one adopted by the Kentucky Courts themselves, as the Court of Appeals pointed out in the second footnote of its opinion at page 3, citing Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 229 (1984), Kentucky Commission on Human Rights v. Commonwealth, Department

of Justice, Ky. App., 1979; and Commonwealth v. Burke, Ky., 481 S.W.2d 51 (1972), as well as KRS 344.020(1)(a).

Based upon his belief that the lower courts have unjustly disposed of his claims against the Defendant under the federal case law of employment discrimination, Frank Martin is now petitioning this Court for a Writ of Certiorari.

ARGUMENT

I

EVEN WITHOUT BEING ALLOWED TO COMPLETE HIS DISCOVERY, THE PETITIONER IN THIS CASE ADDUCED EVIDENCE FROM WHICH A RATIONAL FACTFINDER COULD REASONABLY INFER THAT THE DEFENDANT DISCHARGED HIM FROM HIS EMPLOYMENT BECAUSE OF HIS RACE, SO THAT THE CASE SHOULD NOT HAVE BEEN DISMISSED UPON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

The Petitioner believes that one can reasonably conclude from the following facts of record that the Defendant fired him from his job because of his race:

1. The man who fired the Petitioner and was personally involved in at least two of the discharges that the Defendant meted out to the Petitioner over the years, Ed Cermak:

   a. Knew of and condoned the use of racial epithets by white St Joe employees against Blacks (This Brief, supra, Pp. 2-3); and

   b. At least tacitly supported, and probably encouraged Lonnie Richardson, the Petitioner's direct supervisor, in Richardson's patent and frequent discriminatory

treatment of Petitioner and his Black co-workers under Richardson's supervision (Id., Pp. 4-9); and

c. Tagged the Petitioner a "militant" for opposing St. Joe's practice of designating employees by their race on its company rosters (Id., Pp. 2-3), disapproved of Petitioner's leadership role in the union of which he was a member at St. Joe, and harbored a deep personal hostility toward Martin which manifested itself in a prolonged campaign of harassment of Martin (Id., Pp. 10-18); and

2. None of St. Joe's discipline of Martin was justified by the particular facts of the respective incidents that led to the discipline, including his final discharge (Id.).

As we have seen, the Courts below simply ignored Cermak's role in the discriminatory incidents that took place at St. Joe directed toward the Petitioner, choosing to conclude along with the Defendant that Petitioner's evidence consisted of, ". . . only a few isolated and unrelated

incidents of racial tensions," insufficient to create a prima facie case of illegal racial discrimination (Opinion of the Court of Appeals, P. 5). The Plaintiff believes that in refusing to consider the Plaintiff's more logical interpretation of the evidence of record, particularly Cermak's role in the events described by the Petitioner, the Courts below:

> . . . so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision,

Rules of the Supreme Court, 17.1(a).

This Court has not hesitated to accept cases in which the lower Courts have misunderstood or misapplied the McDonnell-Douglass formulation in the past. Examples of such cases include Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 270 (1981) and United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478 (1983).

In fact, the circumstantial evidence upon which the Petitioner is relying in the case at bar and that which this Court found to be sufficient to support a judgment for the plaintiff in the Aikens case is quite similar, Aikens, 103 S.Ct. at 1481, note 2. Another striking similarity between this case and Aikens, supra, is that in both cases, "The District Court erroneously thought that [plaintiff] was required to submit direct evidence of discriminatory intent," Aikens, 103 S.Ct. 1483, this Brief, supra, P. 23 (JA, P. 189). A significant difference between the cases, of course, is that the District Court tried Aikens, supra, on the merits and was reversed by the appelate Courts in its judgment for the defendant. In the case at bar, of course, the Petitioner's claims have never been tried. Instead they were relegated to that dustbin of the litigation process: summary judgment.

In this case, the Courts below have not only improperly used the McDonnell-Douglass guidelines to dismiss a perfectly credible case of discrimination in employment, but they have also

attempted to provide a rhetorical booster for what amounts to their results-oriented jurisprudence by purporting to rely upon two of this Court's recent opinions upon the subject of the proper considerations to be given to motions for summary judgment, Anderson v. Liberty Lobby, Inc., ___U.S.___, 106 S.Ct. 2505 (1986) and Celotex Corp. v. Catrett, ___U.S.___, 106 S.Ct. 2548 (1986).

The Petitioner suspects that these two cases will frequently be cited to excuse the dismissal of apparently weak cases or even cases where the evidence is only circumstantial. Of course, this is not the limited purpose that this Court obviously intended for these cases to serve. Petitioner believes that this case would be a useful vehicle for nipping in the bud the lower courts' probable propensity to use Anderson, supra, and Celotex, supra, to justify a Darwinian theory of docket control, i.e. disposing of all but the very best cases upon motions for summary judgment. The bench and bar of our republic should be informed that there is no room for such suspect

procedures in the handling of cases of alleged illegal racial discrimination in employment.

II

THE DISTRICT COURT SHOULD HAVE PERMITTED THE PETITIONER TO COMPLETE HIS DISCOVERY BEFORE GRANTING SUMMARY JUDGMENT.

At least as far as the Petitioner was concerned, this case was a procedural nightmare. It is perhaps a textbook example of how a trial-level court should not handle a case.

One of the reasons that the Petitioner filed this case originally in the courts of Kentucky was the belief of his attorney that he would get a more sympathetic hearing there than in the courts of the Western District of Kentucky. Another was that he would get his case tried more quickly than in the federal court. The other reasons that he initially chose a state forum are unrelated to this petition.

After the Defendant removed this case to the United States District Court for Western Kentucky, the District Court more or less put the case on hold early in February, 1984, by delaying the setting of a trial date until after

the Defendant had moved for summary judgment (JA, P. 66). The Defendant finally got around to making this motion on June 5, 1984 (JA, Pp. 71-143).

Unfortunately, the District Court did not finally rule on this motion until April 28, 1986, almost two years after it was filed (JA, P. 213).

Several months earlier the Court had ordered the parties to submit, ". . . direct evidence of employment discrimination," by a date certain (JA, P. 189). The Plaintiff took this to mean that he was free to conduct at least limited discovery to attempt to bolster his claims, and so he submitted Interrogatories to the Defendant that were designed to elicit statistical data that would prove that the Defendant had engaged in a pattern or practice of discrimination against Blacks over the years that the Plaintiff had worked for it (JA, P. 190). In response to a motion by the Defendant which requested that the Court decide the pending summary judgment motion without further ado, especially without allowing the Plaintiff to complete his discovery,

the Plaintiff demanded the right to complete his discovery and file written arguments in response to matters that the Court had raised at a pre-trial conference and which the parties had not yet briefed (JA, Pp. 207-210).

The District Court went ahead and entered its summary judgment without permitting the Plaintiff to complete his discovery or to file written arguments upon the issues raised at the pre-trial conference. The only evidence that the Plaintiff was able to submit was his own affidavit, which outlined most of the incidents that have been recited earlier in this Brief (JA, Pp. 191-198).

The Court of Appeals was well aware that the Plaintiff had outstanding discovery aimed at proving a pattern or practice of discrimination against Blacks upon the part of the Defendant at the time the District Court entered its judgment against the Petitioner (Plaintiff's Brief for the Court of Appeals, Pp. 3-4). It nevertheless at least partially justified its affirmance of the summary judgment upon the Plaintiff's purported failure to:

> . . . establish that St. Joe had engaged in a long-standing pattern or practice of race discrimination, which would have supported the inference that Martin's particular discharge was racially motivated (Opinion of the Court of Appeals, P. 5).

Once again, the Petitioner believes that the District Court, ". . . has so far departed from the accepted and usual course of judicial proceedings," in this case by denying the Petitioner an opportunity to complete his discovery, and that the Court of Appeals has, ". . . so far sanctioned such a departure by a lower court," in approving this conduct on the part of the District Court, ". . . as to call for an exercise of this Court's power of supervision," in order to insure that justice is done in this case, Rule of the Supreme Court, 17.1(a).

III

BOTH OF THE COURTS BELOW DISMISSED THE PETITIONER'S CLAIM THAT HE WAS FIRED IN RETALIATION FOR FILING COMPLAINTS WITH THE EEOC WITHOUT EVEN BEING ASKED TO DO SO BY THE DEFENDANT AND WITHOUT GIVING THE LEAST CONSIDERATION WHATSOEVER TO THE CLAIM.

In his Complaint, the Petitioner alleged that all of the discipline to which he had been

subjected since December 15, 1981, when he filed the first of two complaints with the Equal Employment Opportunities Commission of the United States was, ". . . undertaken in retaliation for Plaintiff's opposing [Defendant's] unlawfully discriminatory practices," against him, as, ". . . prohibited by KRS 344.280(1)." [JA, Pp. 55-57.

The District completely ignored the Plaintiff's retaliation claim in dismissing his whole case. The Petitioner pointed this fact out to the Court of Appeals (Brief for the Court of Appeals, P. 21), which ignored it just as completely as the District Court had done.

As the Petitioner pointed out to the Court of Appeals, a claim of retaliation may stand even if the underlying claim of discrimination must fail, Parker v. Baltimore and Ohio Railroad Co., 652 F.2d 1012, 1020 (D.C. Circ., 1981). The treatment to which the Courts below have subjected the Petitioner's retaliation claim would perhaps have been appropriate if our republic were Wonderland and our courts were appointed by the

Queen of Hearts. As it is, the Petitioner believes that the facts he has recited in this section of his Petition falls well within the parameters of the considerations set forth in Rule 17.1(a) of this Court, and that this Court should grant his Petition.

CONCLUSION

For the reasons stated in this Brief, the Petitioner respectfully request that this Court issue a Writ of Certoriari to the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully Submitted,

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Louisville, Ky. 40206
(502) 895-0671, 634-9126

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FRANK MARTIN
Plaintiff

v. No. C 83-1063-L(B)

ST. JOE CONTAINER COMPANY
Defendant

O R D E R

In accordance with the Memorandum filed this date and the Court having reviewed the record and been sufficiently advised,

IT IS ORDERED that the defendants' motion for summary judgment on the merits is hereby GRANTED.

This is a final and appealable order, there being no cause for delay.

DATED: April 28, 1986

/S/
Boyce F. Martin, Jr.
United States Circuit Judge
(Sitting by designation)

Copies to counsel

ENTERED
APR 28, 1986
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BY: /S/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

FRANK MARTIN
Plaintiff

v. No. C 83-1063-L(B)

ST. JOE CONTAINER COMPANY
Defendant

MEMORANDUM

Frank Martin brought this action in Jefferson Circuit Court alleging race discrimination on the part of his employer, St. Joe Container Corporation, in violation of Ky. Rev. Stat. 344.450.[1] St. Joe had the case removed to federal court based on diversity of citizenship between the parties. After Martin's motion for a preliminary injunction or the setting of a trial date was denied, St. Joe moved for summary judgment based on two grounds - the expiration of the applicable statute of limitations and the merits of the case. The Court denied the motion insofar as it was based on the statute of limitations, because the Kentucky Supreme Court resolved the issue against the defen-

[1]It seems that Martin did not allege a violation of Title VII, 42 U.S.C. § 2000e, et. seq., because he did not satisfy the filing deadline.

dant's position in Clifton v. Midway College, No. 83-CI-071, slip op. (Ky. Sept. 5, 1985). See Memorandum of February 6, 1986. The remaining issues were expressly retained.

With the defendant's motion for summary judgment on the merits still pending before the court, a pretrial conference was held on January 30, 1986. During the pretrial, the court noted that the plaintiff had not come forward with any specific evidence of discrimination, either direct or inferred, and relied only on conclusory allegations insufficient to withstand a summary judgment [1] motion. The court therefore directed plaintiff's counsel to submit whatever additional evidence he could obtain within a month, and specifically to attempt to determine whether the plaintiff was replaced by a nonminority worker. In response the plaintiff submitted an affidavit and status report. The plaintiff also filed interrogatories with St. Joe apparently designed to establish statistical evidence of a pattern or practice of discrimination in the Company. St. Joe has filed a motion to suspend discovery

and requests that its earlier motion for summary judgment on the merits be granted.

Martin's dismissal must be examined in the context of his disciplinary record in the plant. Martin was hired by St. Joe in August, 1972, in a "general utility" position. During the latter part of his employment with the Company, Martin operated a "hot melt" machine which folds blank cardboard boxes into box form and applies glue to the box in order to keep it in that form. The blank cardboard boxes approach the hot melt machine in stacks which are on a roller conveyor. As the blanks come to the machine, the writing on the box is up. In order for the box to be formed with the writing on the outside, it is necessary for the signature to be down. The company's procedure is to have the employee push a stack of boxes into a lift beside the machine and flip a handful of them at a time as they are fed into the machine. This procedure was established in order to prevent injury to employees.

Martin had refused to follow this Company procedure on numerous occasions. On August 23,

1980, Martin received a warning for failing to follow Company instructions. He filed a greivance over this difference, and at the second step grievance meeting the production manager, Ed Cermack, explained that Martin must receive permission from his supervisor in order to deviate from established procedure. [2]

On September 16, 1980, Martin was terminated for again refusing to follow his supervisor's instructions. Again, he filed a grievance protesting his discharge. Through union intercession, Martin's termination was commuted to a suspension from September 11, 1980 to October 21, 1980, and he was then reinstated without backpay. Martin agreed to this settlement.

Several months later, on June 23, 1981, Martin was again terminated for failing to follow his supervisor's instructions. As with his earlier termination, the union negotiated a settlement which commuted Martin's discharge to a 30-day disciplinary layoff without pay. Martin received unemployment compensation for both periods of suspension.

Martin filed an EEOC charge alleging that the June, 1981 termination was because of his race. This charge, along with two others filed by the plaintiff, was dismissed by the EEOC on June 30, 1983.

The plaintiff's final termination occured as a result of an incident which took place on November 22, 1982. Martin's version of that morning's events differs significantly from his supervisor's. Martin's supervisor, Lonnie Richardson, is also black. Richardson testified before an impartial arbitrator that he attempted to tell Martin how he wanted the machine operated, but Martin ignored him and made a flip remark. When Richardson told Martin one more time not to flip the entire load of boxes, Richardson claims Martin replied "Itold you I'm going to run my own machine. I ain't studdin' you, nigger; get away." At that point Richardson told Martin he was going to be suspended for not obeying orders, and together they went to Ed Cermack, the production manager.

At the meeting Cermack suspended Martin

for insubordination. Later, Cermack reviewed Martin's employment history and found that he had been suspended nine times during his employment with St. Joe, for a total of 106 days [3] of suspension. Martin was notified that he was discharged as of November 22, 1982, for insubordination.

Martin filed a grievance, claiming his dismissal was not for just cause. Again through the union, the grievance was carried to arbitration. On April 27, 1983, a hearing was held before an impartial arbitrator, who rendered a decision and award finding that Martin's discharge was for just cause.[2]

Martin filed his action under the Kentucky Civil Rights Act, Ky. Rev. Stat. § 344.450. Kentucky courts have held that the Kentucky statute incorporates federal discrimination law. Kentuck

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[2]The arbitrator's decision was part of the record before the Court. Of course, all facts and inferences which may be drawn from those facts are to be construed in Martin's favor, as the opponent of a summary judgment motion. United States v. Diebold, 369 U.S. 654, 655 (1962). The Court has taken special notice of the claims the plaintiff makes in his affidavit.

Comm'n on Human Rights v. Kentucky, 586 S.W.2d 270 (Ky. App. 1979); Commonwealth v. Burke, 481 S.W.2d 52 (Ky., 1971).

The order and burden of proof in individual claims of disparate treatment is governed by McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1972), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under the standards established in these cases, the plaintiff has the initial burden of establishing a prima facie case of age discrimination, Cooper v. Federal Reserve Bank, ___U.S.___, 104 S.Ct. 2794 (1984). The plaintiff must establish facts which prove or give rise to an inference of unlawful discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for his action. If the defendant produces such a reason, the plaintiff may attempt to show that the reason was a mere pretext for the discriminatory action. Burdine, 450 U.S. at 256. The plaintiff at all times carries the ultimate burden of persuasion

of racial discrimination. Haynes v. Miller, 669 F.2d 1125, 1126-1127 (6th Circ., 1982). [4]

Under McDonnell-Douglas, to prove a prima facie case of racial discrimination, a plaintiff must show:

(i) that he belongs to a racial minority

(ii) that he applied for and was qualified for a job for which the employer was seeking applicants

(iii) that despite his qualifications he was rejected; and

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

The application of the McDonnell-Douglas guidelines to a discriminatory discharge case was analyzed recently by the Sixth Circuit in Beaven v. Kentucky, No. 84-5571, slip op. (6th Cir., Feb. 29, 1986). The Beaven court held that the McDonnell-Douglas guidelines were not to be applied mechanistically in race discrimination actions. Specifically the plaintiff's failure to satisfy

the fourth requirement, that the employer continue to seek applications for the position, should not preclude the plaintiff from establishing a prima facie case. Beaven, slip op. at 7. See also United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983).

Martin argues that he was terminated because of his race. He alleges that the discipline he received was much harsher than that received by white employees who committed the same or similar infractions. However, the plaintiff does not, and cannot dispute the fact that his disciplinary record was extremely poor. Martin had refused to follow his supervisor's orders on several occasions. Therefore, even accepting Martin's allegations of disparate treatment as true, they do not necessarily lead to an inference of discriminatory motive. The McDonnell-Douglas requirement that the plaintiff prove he was qualified for the position remains in effect, and Martin has filed to satisfy that requirement. [5] While the punishment he received for insubordination was very harsh, Martin's prior work history is an

acceptable nondiscriminatory reason for the employer's action. Martin's immediate supervisor, who requested the discipline, is black. No new employee was brought in to replace Martin; the current operators of the hot melt machine are also black. While the replacement issue apparently cannot now prevent a race discrimination plaintiff from establishing a prima facie case, Martin's failure to establish his qualifications for the position does function as a bar. The court holds that the plaintiff's employment history establishes his lack of qualification for the position of hot melt operator.

The ultimate issue in race discrimination actions, is, of course, whether intentional discrimination has occurred. Because of the importance of the consideration of all available evidence to the determination of this ultimate issue, and the dangers involved in granting a motion for summary judgment where issues of intent are involved, the next stages of the McDonnell-Douglas test will be applied to Martin's claims despite the court's holding that a prima facie case was not established.

Assuming, then, that Martin has established a prima facie case, St. Joe must articulate a legitimate, nondiscriminatory reason for its action. Their proffered reason, insubordination, is adequate in this regard. The arbitrator's ruling that just cause existed for St. Joe's action is sufficient to satisfy this light burden, but "to allow that decision to answer conclusively questions raised in the final step of the McDonnell-Douglas analysis unnecessarily limits plaintiff's opportunity to vindicate his statutory and constitutional rights." Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982).

Of course, a race discrimination plaintiff need not present direct evidence of discrimination; it is sufficient to present facts from which an inference may be drawn. However, such an inference may not be drawn in this case. The [6] plaintiff has presented only allegations that some white employees may have committed some of the same infractions. Most of the incidents he described occured many years ago, and he does not

allege that these employees had any prior disciplinary history. Therefore, viewing all the facts in a light most favorable to Martin, no inference of intentional discrimination may be drawn in this case.

The defendant's motion for summary judgment is granted.

DATED: April 28, 1986

/S/
Boyce F. Martin, Jr.
United States Circuit Judge
(Sitting by designation)

Copies to counsel

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NOT FOR PUBLICATION

No. 86-5583

FILED
MAY-5 1987
JOHN P. HEHMAN,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK MARTIN, Plaintiff-Appellant,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY
v.	)	
ST. JOE CONTAINER CO., Defendant-Appellee	)	

BEFORE: LIVELY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Per Curiam. Plaintiff-appellant Frank Martin appeals the district court's grant of summary judgment in favor of defendant-appellee St. Joe Container Co. ("St. Joe") in this employment discrimination action brought pursuant to the Kentucky Civil Rights Act. See Ky. Rev. Stat. Ann. § 344.010 et. seq. (Baldwin, 1979). Martin contends that whether he was qualified for his job, and whether his discharge was racially motivated, were genuine issues of material fact that should have precluded summary judgment. Because we find that the district court properly concluded that no genuine factual issue existed concerning

whether Martin's discharge was racially motivated, we affirm.

Martin, a black, was hired by St. Joe in August, 1972. His termination arose from the events of November 22, 1982. According to St. Joe, Martin was suspended for insubordination after he disobeyed a direct order concerning how to operate the machine on [1] which he worked. Martin contrarily contends that he disobeyed no order that day, but that his suspension was merely another example of racial discrimination at St. Joe. In any event, subsequent to Martin's suspension, St. Joe's plant supervisor reviewed Martin's employment history and found it to be the worst of any employee's at the plant. Martin's employment record revealed that he had been suspended nine times, three times for insubordination. On two of the three occasions when Martin had allegedly been insubordinate, he was initially terminated, but was reinstated each time and his termination was reduced to a suspension in resolution of his grievance. Because of Martin's repeated insubordi-

dination, however, St. Joe terminated his employment.

After an impartial arbitrator concluded that Martin was discharged for "just cause," Martin filed the instant action in Kentucky state court. St. Joe removed the case to federal court based on diversity of citizenship. See 28 U.S.C. §§ 1441(a) (1982). The district court subsequently granted St. Joe's motion for summary judgment on alternative grounds. First, the court held that Martin failed to establish a prima facie case of race discrimination because his history of insubordination conclusively showed that he was not qualified for his position. Second, the court held that even if Martin was qualified, summary judgment was still appropriate because he failed to present sufficient evidence form which a factfinder could rationally infer that his discharge was motivated by considerations of race.

Martin contends that both of the district court's grounds for granting summary judgment were erroneous. We disagree. [2] In our view,

the district court properly concluded that Martin failed to present sufficient facts from which an inference of racial discrimination could be drawn.[1]

Initially, we note that a district court should grant a summary judgment motion only if the evidence before the court, viewed "in the light most favorable to the party opposing the motion, Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979), shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R. Civ. P. 56(c). To defeat a properly supported summary judgment motion, however, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-54 (1980). A factual issue is "genuine" if the evidence before the district court presents an issue that "may reasonably be resolved in favor of either party." Anderson v.

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[1] In view of this holding, we need not consider the propriety of the district court's alternative holding that Martin was unqualified to perform his job.

Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986).

We are further guided in our resolution of this matter by the familiar analysis enunciated in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny,[2] and specifically by [3] the requirement that a plaintiff must establish a prima facie case by presenting evidence which, if not explained, gives rise to an inference that his discharge was racially motivated. See Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370, 374-375 (6th Cir. 1984). The prima facie case in discriminatory discharge cases is often said to require the plaintiff to prove that he belongs to a racial minority, that he was qualified for and was satisfactorily performing his job, that he was terminated, and that he was replaced by a nonminority worker. Becton v. Detroit Terminal of Consolidated Freightways, 687

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[2]Although Martin brought this action under the Kentucky Civil Rights Act, see Ky. Rev. Stat. Ann. § 344.010 et seq. (Baldwin 1979), Kentucky courts have held that this Act incorporates federal discrimination law under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e et. seq. (1982). See Harker v. Federal Land Bank of Louisville, 679 S.W.2d 226, 229 (Ky., 1984); Kentucky Commission on Human Rights v. Commonwealth, 586 S.W.2d 270, 271 (Ky. App. 1979); see also Commonwealth v. Burke 481 S.W.2d 52 (Ky. 1979); KY. Rev. Stat. Ann. § 344.020(1)(a) (Baldwin 1979).

F.2d 140, 141 (6th Cir. 1982), cert. denied, 460 U.S. 1040(1983); see also Beaven v. Commonwealth of Kentucky, 783 F.2d 672, 676 (6th Cir. 1986).[3] However, this model was "never intended to be rigid, mechanized, or ritualistic." United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)). In particular, this court has held that a plaintiff need not show that he was replaced by a nonminority worker if other evidence before the court supports an inference of a racially motivated discharge. See Beaven, 783 F.2d at 676.

In the instant case, it is undisputed that Martin produced no evidence to show that he was replaced by a nonminority worker. The issue for our review, therefore, is whether the district court [4] properly held that Martin failed to adduce "other evidence" from which an inference of racial motivation for his discharge could be

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[3]For the purposes of our analysis, we assume that Martin was qualified for and was satisfactorily performing his job. See supra, note 1.

drawn.[4] We agree with the district court that Martin failed to produce sufficient evidence of this type to get over the summary judgment hurdle. At best, he showed only a few isolated and unrelated instances of racial tension occuring in the workplace during his ten years of employment at St. Joe. Such evidence is insufficient to establish that St. Joe had engaged in a long-standing pattern or practice of race discrimination, which would have supported the inference that Martin's particular discharge was racially motivated. See, e.g., Wooten v. New York Telephone Co., 485 F.Supp. 748, 758-60 (S.D. N.Y., 1980). Martin also failed to support a disparate treatment theory of race discrimination; he simply did not show the existence of any similarly situated white employee who was not fired for insubordination. See e.g., Cooper v. City

4. The district court's alternative holding, on which we rely, concluded that Martin failed to produce evidence sufficient to create a genuine factual issue on the "ultimate question" of the motivation for his discharge. As discussed above, however, because Martin did not show that he was replaced by a nonminority worker, we view this failure of proof as negating the existence of the requisite prima facie case. See Beaven v. Commonwealth of Kentucky, 783 F.2d 672, 676 (6th Cir. 1986).

of North Olmsted, 795 F.2d 1265, 1270 (6th Cir. 1986); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 69 (6th Cir. 1985). Consequently, Martin failed to establish the existence of a factual issue which could have reasonably been "resolved in favor of either party," Liberty Lobby, 106 S.Ct. at 1511; see Celotex Corp., 106 S.Ct. at 2553; Fed. R. Civ. P. 56(e), concerning whether his discharge was racially motivated. Accordingly, summary judgment was appropriate. See Fed. R. Civ. P. 56(c).

For the foregoing reasons, the judgment of the district court is AFFIRMED.

ISSUED AS MANDATE: 5/28/87

COST: none

A TRUE COPY
Attest:
JOHN P. HEHMAN, CLERK
BY: /S/
Deputy Clerk

STATUTES WHICH THE CASE INVOLVES

Kentucky Revised Statutes 344.020(1)(a):

The general purposes of this chapter are: (a) To provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964 as amended (78 Stat. 241), Title VIII of the federal Civil Rights Act of 1968 (82 Stat. 81), and the federal Age Discrimination in Employment Act of 1967 (81 Stat. 602); .....

Kentucky Revised Statutes 344.040(1):

It is unlawful practice for an employer: (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70); . . .

Kentucky Revised Statutes 344.280(1):

It shall be an unlawful practice for a person, or for two (2) or more persons to conspire: (1) To retaliate or discriminate in any manner

against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge, filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this chapter;. . .

Kentucky Revised Statutes 344.450:

Any person deeming himself injured by any act in violation of the provisions of this chapter shall have a civil cause of action in circuit court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record, all of which shall be in addition to any other remedies contained in this chapter.

CERTIFICATE OF SERVICE

I hereby certify that I have delivered true copies of this Petition to David Sandler, Esq., and Matthew Westfall, Esq., attornies for the Respondent, by mailing or delivering the same to their office at 501 South 2d Street, Louisville, Ky. 40202, upon this the 29th day of July, 1987, as per Rule 28.3 of the Supreme Court of the United States.

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FILED
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No. 87-190

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRANK MARTIN, - - - - - Petitioner,

versus

ST. JOE CONTAINER COMPANY, - - Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ST. JOE CONTAINER COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 87-190

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRANK MARTIN, - - - - - *Petitioner,*

v.

ST. JOE CONTAINER COMPANY, - - *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ST. JOE CONTAINER COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case arose in 1982 from the decision of Respondent, St. Joe Container Company (St. Joe or Company), to discharge Petitioner Frank Martin. Martin was terminated for insubordination after he disobeyed a direct order of his supervisor concerning how to operate the machine on which he worked. Martin had been terminated twice before for failing to follow his supervisor's orders and had been suspended nine times during his employment.[1] (J.A. 78)[2]

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[1]Pursuant to Supreme Court Rule 28.1, St. Joe Container Company is a wholly-owned subsidiary of St. Joe Paper Company. No other publicly owned corporation has a financial interest in the outcome of this case.

[2]All citations so designated are to the Joint Appendix which is a part of the record before the Sixth Circuit Court of Appeals.

Martin filed a grievance pursuant to the collective bargaining agreement in effect at the Company. The grievance alleged that Martin's discharge was not for just cause. The grievance was carried to arbitration. On July 28, 1983, Arbitrator Theodore High rendered a decision finding that Martin's discharge was for just cause. (J.A. 100-105).

In October, 1983, Martin filed this action in state court under Kentucky's Civil Rights Act, KRS Chapter 344, claiming that his discharge was because of his race or in retaliation for his prior EEOC charges. (J.A. 55-57). The action was subsequently removed to Federal Court on diversity grounds.

The Company moved for summary judgment on June 5, 1984. (J.A. 71-143). The District Court granted the Company's Motion on April 28, 1986. (J.A. 213-220; Petition For Writ of Certiorari, pp. 44-54). The Court concluded that Martin failed to establish his qualifications for the position from which he was terminated and, thus, failed to establish a prima facie case of race discrimination. The Court further held that even if Martin had established a prima facie case, he failed to produce any evidence demonstrating that the Company's articulated reasons for his termination were pretextual. (J.A. 213-220).

Martin filed a Notice of Appeal on May 20, 1986. After briefs were filed and oral argument was held, the Sixth Circuit Court of Appeals affirmed the grant of summary judgment. Specifically, the Sixth Circuit Court of Appeals found that Martin "failed to estab-

lish the existence of a factual issue which could have reasonably been

> " 'resolved in favor of either party,' *Liberty Lobby,* 106 S. Ct. at 2511; see *Celotex Corp.,* 106 S. Ct. at 2553; Fed. R. Civ. P. 56(e), concerning whether his discharge was racially motivated." (Petition for Certiorari, p. 62).

Martin has now petitioned this Court to review the Sixth Circuit Court of Appeals' Decision.

SUMMARY OF ARGUMENT

Supreme Court Rule 17.1 states that certiorari will be granted "only when there are special and important reasons therefor." Martin's Petition for Certiorari presents no special or important reasons that would justify the granting of certiorari in this case. Specifically, the questions presented for review do not represent departures from the "accepted and usual course of judicial proceedings" as Martin claims. The District Court properly granted summary judgment on the basis that Martin provided no evidence which would create an inference that he was terminated because of his race. The Sixth Circuit Court of Appeals properly affirmed.

ARGUMENT

The Petition Should Be Denied Because Petitioner Can Show No Special Or Important Reason For Granting Certiorari As Required By Supreme Court Rule 17.1.

Petitioner poses three questions for review. Each concerns the propriety of the District Court's decision

to grant summary judgment in this case and the Sixth Circuit Court of Appeal's affirmance of that decision. The questions presented for review are whether a court may ignore a plaintiff's reasonable interpretation of evidence; may grant summary judgment without allowing the plaintiff to complete discovery, and grant summary judgment while ignoring certain of plaintiff's claims.

Supreme Court Rule 17.1 sets forth those considerations which govern the granting of certiorari. Initially, the Rule provides that certiorari "will be granted only when there are special and important reasons therefor." Martin relies exclusively on the grounds stated in Rule 17.1(a):

> "When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

This case is not appropriate for review pursuant to the standards of Rule 17.1(a).

Martin first claims that both of the lower courts "departed from the accepted and usual course of judicial proceedings" by "refusing to consider the Plaintiff's more logical interpretation of the evidence of record." (Petition, p. 33).[3] Both the District Court

[3]The Petition for Certiorari, including the decisions of the two lower courts, which are appended thereto, will be referenced by enclosing "Petition" and the appropriate page number in parentheses.

and the Sixth Circuit Court of Appeals (a total of four federal judges), considered Martin's alleged evidence of race discrimination and found it insuffiicient to preclude summary judgment. Martin is simply attempting to obtain a third bite of the apple with this Petition for Certiorari. Providing a third review of the sufficiency of the evidence of record is not an exercise of this Court's "supervisory powers" within the meaning of Rule 17.1(a).

Most certainly, the Court's rejection of Martin's "interpretation of the evidence" is not a departure from the "accepted and usual course of judicial proceedings" calling for the exercise of this Court's supervisory powers. Both Courts properly reviewed Martin's alleged evidence of race discrimination under the evidentiary standards established by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973) and its progeny. They both found it lacking. There is no basis for disturbing the lower courts' decisions on this issue.

Martin further contends that certiorari should be granted because the District Court "erroneously thought that [plaintiff] was required to submit direct evidence of discriminatory intent." (Petition, p. 34). The District Court imposed no such requirement. As stated in the District Court's Memorandum granting summary judgment:

> "Of course, a race discrimination plaintiff need not present direct evidence of discrimination; it is sufficient to present facts from which an infer-

> ence can be drawn. However, such an inference may not be drawn in this case." (Petition, p. 53).

There is no indication that either the District Court or the Sixth Circuit Court of Appeals "misunderstood or misapplied" the parties' respective burdens under Title VII of the Civil Rights Act, 42 U.S.C. Sec. 2000e *et seq.* Martin's contention to the contrary is factually baseless.

Martin also requests this Court to grant certiorari to "nip[ping] in the bud the lower courts' *probable propensity* to use" *Anderson* v. *Liberty Lobby, Inc.*, — U. S. —, 106 S. Ct. 2505 (1986) and *Celotex Corp.* v. *Catrell*, — U. S. —, 106 S. Ct. 2548 (1986) as a basis for improperly dismissing weak cases. Martin, however, does not argue that *Anderson, supra,* or *Celotex, supra,* were misapplied, in this case. This is because the lower courts correctly applied the two cases. Martin's only argument is that the courts may in the future misapply *Anderson* or *Celotex.* How the federal courts may apply these two cases in the future is irrelevant. Martin has petitioned for certiorari in this case where *Anderson* and *Celotex* were properly interpreted and applied.

The second question Martin presents for review is whether a federal court may grant summary judgment before a plaintiff completes discovery. Martin's question is misleading since the answer depends on the circumstances of the case. This action was filed in October, 1983. The Company moved for summary judgment in June, 1984. Summary judgment was

granted on April 28, 1986 — two and a half years after the action was filed.

Martin's argument that the District Court departed from the "accepted and usual course of judicial proceedings" by granting summary judgment when he wanted to conduct further discovery, is without merit. Martin cannot blame the Court for his failure to conduct additional discovery. Rather, it is his fault.

Martin responded to the Company's motion for summary judgment contending he had produced sufficient evidence of race discrimination to preclude summary judgment. If he needed additional discovery, he should have availed himself of the procedures contained in Rule 56(f) of the Federal Rules of Civil Procedure. Rule 56(f) provides that in response to a motion for summary judgment a party may request the Court to order a continuance so discovery can be taken. In addition, nothing precluded Martin from conducting discovery while the motion for summary judgment was pending.

Martin had more than sufficient opportunity to conduct discovery. The District Court's decision to grant summary judgment despite Martin's request for additional discovery was proper under the circumstances. In no event does the District Court's decision in this regard rise to the level of a departure from the "accepted and usual course of judicial proceedings." Rather, it was a matter of judicial discretion.

The third question presented for review by Martin is whether a federal court can grant summary judg-

ment in a case involving "multiple claims while completely ignoring all but one of the claims." (Petition, p. i). Again, Martin's phrasing of the question is misleading. Of course, a federal court cannot just ignore a claim and grant summary judgment. However, this is not what happened in this case.

Martin had two claims: retaliation and race discrimination. (J.A. pp. 55-57). He contends that the Company did not request the Court to dismiss the retaliation claim, but that the Court did so without giving it any consideration. Martin's first statement is incorrect. The Company specifically stated in its Memorandum of Law In Support of Summary Judgment:

> "Defendant is entitled to summary judgment on the issue of whether he was discharged because of his race or in retaliation for his prior filing of EEOC charges." (J.A. p. 98).

Martin, in responding to the motion for summary judgment, did not address his retaliation claim. He provided no evidence to support such a claim. (J.A. pp. 145-160 and 192-198).

The District Court granted summary judgment of the entire case. The Court did not specifically address Martin's retaliation claim. However, it was not required to do so under Rule 52(a) of the Federal Rules of Civil Procedure. That Rule states:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

In light of Martin's failure to provide any evidence in support of his retaliation claim, it is not surprising that the District Court made no findings of fact and conclusions of law with respect to it. The District Court's failure to make such a finding or a conclusion clearly is not a departure "from the accepted and usual course of judicial proceeding." If anything, it should have been expected under the circumstances.

Supreme Court Rule 17.1 provides that certiorari will be granted "when there are special and important reasons therefor." Martin's Petition for Certiorari presents no "special and important reasons" justifying the granting of certiorari. The questions Martin presents for review are insubstantial and represent nothing more than his disagreement with the lower Courts' analysis of this case. There is no basis for the granting of certiorari.

CONCLUSION

In light of the foregoing, St. Joe Container Company requests that this petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing has been served by mail pursuant to Supreme Court Rule 28.3 upon Philip C. Kimball, Attorney for Petitioner, 200 Kennedy Avenue, Louisville, Kentucky 40206 on this 24 day of August, 1987.

Attorney for Respondent